

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY)	MDL No.1456
AVERAGE WHOLESALE PRICE)	
LITIGATION)	Master File No. 01-CV-12257-PBS
)	Subcategory No. 06-CV-11337-PBS
)	
)	Judge Patti B. Saris
)	
THIS DOCUMENT RELATES TO:)	Magistrate Judge Marianne B. Bowler
<i>United States of America ex rel. Ven-A-Care of</i>)	
<i>the Florida Keys, Inc., et al. v. Boehringer</i>)	
<i>Ingelheim Corporation, et al.</i> , Civil Action No.)	
07-10248-PBS)	
)	

**UNITED STATES' OPPOSITION TO ROXANE'S MOTION FOR
LEAVE TO FILE EXHIBITS AND OTHER MATERIALS CONTAINING
CONFIDENTIAL PRICING INFORMATION UNDER SEAL**

On July 23, 2009, Roxane moved for an order requiring the United States to file under seal “certain exhibits and other material containing confidential pricing information from 2004 through 2006.” (Dkt. No. 6287) On July 24, the United States filed its summary judgment papers, including a declaration from its expert accountant, Simon Platt (“Platt Declaration”), identifying Roxane’s average sales prices to the retail pharmacy class of trade, and comparing those average prices to the Average Wholesale Prices (“AWPs”) Roxane reported to the pricing compendia. In light of Roxane’s motion, the United States filed the Platt Declaration under seal. For the following reasons, Roxane’s motion to seal should be denied and the Platt Declaration should be publicly filed.

In the First Circuit, there is a “presumption of public access to judicial records.” *See In re Boston Herald, Inc.* 321 F.3d 174, 189 (1st Cir. 2003) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)); *see also, e.g., Panse v. Shah*, 201 Fed. Appx. 3, 3 (1st Cir. 2006) (“Sealing is disfavored as contrary to the presumption of public access to judicial records of civil proceedings” and is “justified only for compelling reasons”). A “party seeking to file a document under seal must demonstrate that ‘good cause’ exists to do so.” *Dunkin Donuts Franchised Rests., LLC v. Agawam Donuts, Inc.*, C.A. No. 07-11444, 2008 WL 427290, at *1 (D. Mass. Feb. 13, 2008). “Demonstrating ‘good cause’ entails making a particularized factual showing of the harm that would be sustained if the court did not allow the filing under seal.” *Id.*

Roxane has made no such showing with regard to the pricing information contained in the Platt Declaration at issue here. In the context of the AWP litigation, this Court has taken a narrow view of information that may properly be filed under seal. As Roxane points out, the Protective Order in this case, for example, provides that the designation “confidential” is “limited to *current* information” that a party believes in good faith to contain “*current* proprietary or commercially sensitive information.” Even if the information might qualify for a “confidential” designation in the process of document production, it may not automatically be filed under seal. Instead, if the parties disagree, the party wishing to file under seal must seek leave of court, and show why the document is confidential.

The documents which Roxane seeks to seal here are not internal company documents. Rather, they are *summaries* of pricing data two and a half to five years old, that do not contain “current information” whose disclosure is likely to cause Roxane competitive injury. The graphs and summaries contained in the Platt Declaration *aggregate* pricing data annually (and in some

cases quarterly) across *all* retail pharmacy customers.¹ The information at issue lacks the precision necessary to determine Roxane's sales price to any particular customer. Under these circumstances, disclosure of such aggregate pricing summaries is not likely to provide any of Roxane's competitors a commercial advantage. Although Roxane does not concede this point, its fellow defendant (and sometime competitor) Dey Laboratories has not objected to the public filing (in the United States' case against Dey), of similar graphs and summaries prepared by Mr. Platt based on Dey's pricing data.

Finally, the interest in public disclosure of the Platt Declaration is particularly strong in this case which, after all, relates to Roxane's reporting of inflated AWP's. The information contained in the Platt Declaration is critical to demonstrating that Roxane's AWP's were false, and the extent to which Roxane's AWP's exceeded its actual sales prices. In a case alleging fraudulent price reporting and damages to the public fisc, there is a compelling interest in public access to evidence of accurate pricing information. *See Gitto Global Corp. v. Worcester Telegram & Gazette Corp.*, C.A. No. 05-10334, 2005 WL 1027358, at *10 (D. Mass. May 2, 2005) (orderly public filing of report in bankruptcy proceeding, and observing that "common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know") (internal citation omitted).

Accordingly, Roxane's Motion should be denied and the clerk directed to put the currently-sealed Exhibit # 3 to the Declaration of James J. Fauci Submitting Exhibits in Support

¹The graphs and summaries for Roxanol (which contain pricing information from 1997 to 2002) are attached hereto as Exhibit A, and illustrate the type of information Roxane seeks to seal for later years.

of Plaintiff's Motion for Partial Summary Judgment and in Opposition to the Roxane Defendants' Motion for Partial Summary Judgment onto the public docket.

DATED: July 31, 2009

Respectfully submitted,

MICHAEL F. HERTZ
DEPUTY ASSISTANT ATTORNEY GENERAL

MICHAEL J. LOUCKS
ACTING UNITED STATES ATTORNEY

By: /s/ James J. Fauci
GEORGE B. HENDERSON, II
BARBARA HEALY SMITH
JAMES J. FAUCI
Assistant U.S. Attorneys
United States Courthouse
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3272

JOYCE R. BRANDA
DANIEL R. ANDERSON
LAURIE A. OBEREMBT
Civil Division
Commercial Litigation Branch
P. O. Box 261, Ben Franklin Station
Washington, D.C. 20044
(202) 514-3345

For the relator, Ven-A-Care of the Florida
Keys, Inc.,
JAMES J. BREEN
The Breen Law Firm, P.A.
Suite 260
5755 North Point Parkway
Alpharetta, Georgia 30022
Phone (770) 740-0008

SUSAN S. THOMAS
GARY L. AZORSKY
ROSLYN G. POLLACK
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: 215-875-3000

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused an electronic copy of the above to be served on all counsel of record via electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to LexisNexis File & Serve for posting and notification to all parties.

/s/ James J. Fauci
JAMES J. FAUCI

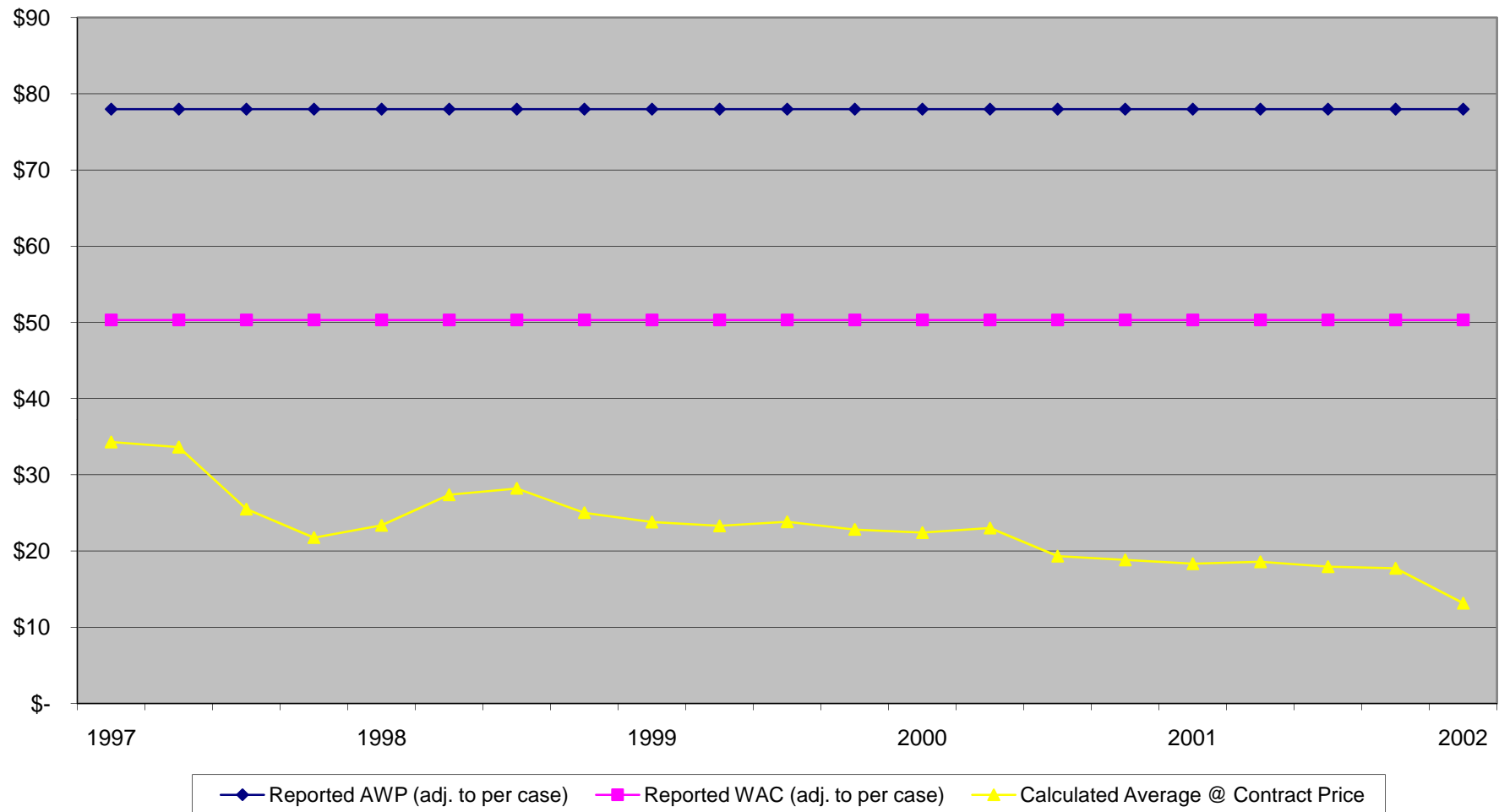
Dated: July 31, 2009

Exhibit A

United States of America ex rel. Ven-a-Care of the Florida Keys, Inc. v. Boehringer Ingelheim Corp. et al.
Civil Action No. 07-10248-PBS

United States' Opposition to Roxane's Motion For Leave to File Exhibits
and Other Materials Containing Confidential Pricing Information Under Seal

Graph A8
Roxane Indirect Transaction Data
Reported AWP & WAC vs. Calculated Average @ Contract Price for Pharmacy COT
Roxanol 54375150



Summary A8 - Roxanol AWP and WAC Comparison for Pharmacy COT
Roxane Indirect Transaction Data

Year	Reported AWP (adj. to per case)	Reported WAC (adj. to per case)	Calculated Average @ Contract Price	AWP Spread [1]	WAC Spread [2]
------	------------------------------------	------------------------------------	--	-------------------	-------------------

Roxanol 54375150

1997	\$	77.96	\$	50.31	\$	33.66	131.6%	49.5%
1998	\$	77.96	\$	50.31	\$	25.67	203.7%	96.0%
1999	\$	77.96	\$	50.31	\$	25.02	211.6%	101.1%
2000	\$	77.96	\$	50.31	\$	22.98	239.2%	118.9%
2001	\$	77.96	\$	50.31	\$	18.73	316.1%	168.6%
2002	\$	77.96	\$	50.31	\$	17.82	337.4%	182.3%

Roxanol 54375144

1997	\$	20.76	\$	13.40	\$	8.38	147.8%	59.9%
1998	\$	20.76	\$	13.40	\$	7.13	191.0%	87.9%
1999	\$	20.76	\$	13.40	\$	6.98	197.2%	91.9%
2000	\$	20.76	\$	13.40	\$	6.08	241.4%	120.4%
2001	\$	20.76	\$	13.40	\$	5.42	282.8%	147.1%
2002	\$	20.76	\$	13.40	\$	5.31	291.3%	152.6%

Roxanol 54375158

1997	\$	131.22	\$	73.61	\$	68.07	92.8%	8.1%
1998	\$	131.22	\$	73.61	\$	56.98	130.3%	29.2%
1999	\$	131.22	\$	73.61	\$	56.03	134.2%	31.4%
2000	\$	131.22	\$	73.61	\$	43.70	200.3%	68.4%
2001	\$	131.22	\$	73.61	\$	32.98	297.9%	123.2%
2002	\$	131.22	\$	73.61	\$	31.75	313.3%	131.9%

[1] For purposes of this summary, AWP Spread is calculated as: (Reported AWP less the Calculated Average @ Contract Price)/Calculated Average @ Contract Price.

[2] For purposes of this summary, WAC Spread is calculated as: (Reported WAC less the Calculated Average @ Contract Price)/Calculated Average @ Contract Price.